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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 485.

LOCAL 20, TEAMSTERS, CHAUFFEURS AND HELPERS
UNION,

an Affiliate of the International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,

Petitioner,

vs.

LESTER MORTON, d/b/a LESTER MORTON TRUCKING
COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF.

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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RESPONDENT'S BRIEF.

OPINIONS BELOW.

The opinion of District Court (R. 276-290) is reported 200 F. Supp. 653. The opinion of the Court below (R. 291-296) is reported in 320 F. 2d 505.

JURISDICTION.

The judgment of the Court below was entered on July 25, 1963. The petition for writ of certiorari was filed on September 20, 1963 and was granted on December 9, 1963. The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Teamsters Union's secondary strike activity violated Section 303, LMRA, and whether the courts below correctly awarded damages thereunder.

2. Whether the Teamsters Union's secondary strike activity also violated Ohio's common law and if so, whether the courts below correctly awarded punitive and compensatory damages thereunder, in addition to the O'Connell and Wilson damages that are supported by the state common law and Section 303, LMRA.

3. Whether the Federal District Court had pendent jurisdiction to award compensatory and punitive damages under the Ohio common law.

STATUTE INVOLVED.

The statutory provision involved is Section 303 of the Labor-Management Relations Act of 1947, 61 Stat. 158, 29 USC, Section 187 (referred to as "LMRA"). It is printed in Appendix A, *infra*, pp. 56-57. Although certain amendments to Section 303 were made by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 545, 29 USC, Sec. 187, such amendments are not germane to the questions presented in this case.

STATEMENT.

The Respondent, Lester Morton, d/b/a Morton Trucking Company (referred to as "Respondent"), is engaged in the general dump truck business in Tiffin, Ohio operating approximately 50 dump trucks as a subcontractor on highway construction (R. 269). For some years the Respondent's employees had been members of the Petitioner, Teamsters Local 20 (referred to as "Teamsters Union"), under an oral agreement, but on August 17, 1956 the Teamsters Union struck in support of its demands for a written contract and wage increases (R. 269-70).¹

The Teamsters Union did not engage in any actual physical violence during the strike, which ended October 5, 1956 (R. 270-1) but this case does involve threats to the public order and intimidation (R. 56-8, 82-4).

On August 21, 1956 the Common Pleas Court of Seneca County, Ohio restrained the Teamsters Union from, inter alia, engaging in secondary boycott activity, from intimidating Respondent's employees and from following Respondent's employees on the public highways or elsewhere (R. 270-1). The Teamsters Union, however, engaged in unlawful secondary boycott activity, in defiance of the restraining order (R. 289).

¹ On page 3 of its brief the Teamsters Union states as a fact that "Respondent's demand that any written agreement be conditioned upon (the Teamsters Union's) securing similar written agreements covering Respondent's competitors" caused an impasse which "precipitated" the strike. This is untrue. The District Court did not so find. As a matter of fact, the Teamsters Union represented to Respondent, prior to the strike, that it already had contracts with most of Respondent's competitors and Respondent merely asked that the Teamsters Union substantiate its representation (R. 239). The strike was the result of the Teamsters Union's demand that Respondent agree to a contract at the first negotiating session between the parties (R. 251). The Teamsters Union made good on its threat to strike the following morning if its demands were not met immediately (R. 270).

The Teamsters Union maliciously engaged in secondary activity unlawful under Section 303, LMRA and the common law of Ohio (R. 275-6). This unlawful activity made the strike effective to intimidate Respondent's employees, customers and suppliers, severely damaging Respondent's business as hereinafter set forth.²

The District Court concluded that the material and operative facts supporting Respondent's federal claim of secondary activity unlawful under Section 303, LMRA, were substantially the same as the facts supporting his non-federal or state common law claim of unlawful secondary activity and that there are not involved two causes of action, but simply different grounds to support the same cause of action, the cause of action being the Teamsters Union's violation of Respondent's right to be free from unlawful interference with his business (R. 275). The District Court also concluded that it had jurisdiction to award compensatory and punitive damages under the common law in addition to having jurisdiction to award compensatory damages under Section 303, LMRA (R. 275). The District Court also found that the Teamsters Union had engaged in both lawful and unlawful strike activity and concluded that therefore the totality of the Teamsters Union's efforts should be considered in assessing damages based upon all loss suffered as a result of the strike (R.

² "The records of the National Labor Relations Board show that from the enactment of Taft-Hartley in 1947 until the present, 34 percent of the secondary boycott cases coming to the Board involve the Teamsters Union which represents about 10 percent of all of the members of organized labor. Thus, the figures demonstrate, that like minority picketing, the secondary boycott is a favorite device of the Teamsters, and is used by them at least three and one-half times as frequently as it is by any of the rest of the labor movement." Minority Views, Senate Report No. 187, April 14, 1959 regarding Labor-Management Disclosure Act of 1959, U. S. Code Congressional and Administrative News, 1959, part 2, pages 2318, 2382.

276). The Court of Appeals affirmed these findings and conclusions (R. 295).

The District Court found that the Respondent suffered net specific damages in the total amount of \$19,619.62 (R. 274, F. F. 12³) and awarded compensatory damages in that amount together with punitive damages in the amount of \$15,000.00 as a consequence of the fact that the Teamsters Union's conduct was pursued maliciously and in wanton disregard of the legal rights of the Respondent (R. 275, F. F. 13). The Court of Appeals affirmed.

The District Court concluded that the Teamsters Union violated Section 303, LMRA, by conduct affecting Respondent and one of his suppliers (France) and two of his customers (Schoen and O'Connel) (R. 275-6, C. L. 5) and awarded \$1,600.00⁴ in damages as the result of the Section 303, LMRA violation with respect to Respondent's customer, O'Connel (R. 249, 275-6, C. L. 5). The District Court also found that as a result of a combination of the Teamsters Union's activity that was in part lawful (i.e., its primary picketing at Respondent's garage) and in part unlawful under Section 303, LMRA and the state common law, Respondent had an insufficient number of truck drivers during the strike to perform fully his contract with his customer Wilson (R. 274, F. F. 11). Because it was impossible to determine how many truck driver employees of the Respondent failed to work during the strike because of (1) simply the lawful primary picket line, on the one hand, and (2), the secondary activity of the Teamsters Union violative of Section 303, LMRA and the state common law, on the other, the District Court concluded that the totality of the Teamsters Union's strike activity should be considered and awarded Respondent the total damages

³ F. F.: Finding of Fact, C. L.: Conclusion of Law.

⁴ References to damages will be made in round numbers.

(\$9,300.00) he suffered as the consequence of the strike causing him to lose the Wilson job (R. 249, 276, C. L. 6).

The District Court also concluded that the Teamsters Union violated the Ohio common law against secondary strike activity by the conduct violative of Section 303, LMRA and, additionally, by conduct affecting Respondent and another customer (Lauder) (R. 275-6, C. L. 5). The District Court awarded \$8,700.00 in damages as the result of the Teamsters Union's common law tort with respect to Respondent's customer Lauder (R. 249, 275-6, C. L. 5).

The District Court also found that the Teamsters Union's secondary strike activity violative of the state common law was undertaken maliciously and with wanton disregard of the rights of the Respondent and of others and awarded Respondent \$15,000.00 in punitive damages under the state common law (R. 275, F. F. 13 and 14).

The Court of Appeals affirmed (R. 295-6) the foregoing holdings of the District Court, the facts supporting which will be briefly described in the following paragraphs.

A. SECTION 303 VIOLATIONS.

1. France Stone Company.

One of Respondent's suppliers was The France Stone Company. In violation of the restraining order and in violation of Section 303, LMRA (and the state's common law), the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged France's employees to engage in a concerted refusal to load Respondent's trucks for the purpose of forcing France to cease doing business with the Respondent (R. 46-52, 73, 97-8, 104, 272 F. F. 6, 275, F. F. 13, C. L. 5, R. 284).

2. O'Connel Coal Co.

Another of Respondent's customers was the O'Connel Coal Co. In violation of Section 303, LMRA (and the state's common law), the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged O'Connel's employees to force O'Connel (and encouraged the management of O'Connel direct), to cease doing business with the Respondent (R. 121, 122, 126, 127, 272-3, F. F. 7, R. 275, F. F. 13, C. L. 5, R. 284-5). Consequently, O'Connel ceased doing business with the Respondent during the strike (R. 127, 273, F. F. 7(d)) and Respondent suffered \$1,600.00 in damages (R. 249, 274, F. F. 12).

3. C. A. Schoen, Inc.

Another of Respondent's customers was C. A. Schoen, Inc. In violation of the restraining order and in violation of Section 303, LMRA (and the state common law), the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged Schoen's employees to force Schoen (and encouraged the management of Schoen direct), to cease doing business with the Respondent (R. 56-60, 81-86, 133-145, 273-4, F. F. 10, R. 275-6, F. F. 13, C. L. 5, R. 285). Consequently, Schoen ceased doing business with the Respondent during the strike (R. 145, 274, F. F. 9(d)).

B. COMMON LAW VIOLATIONS.

1. Launder & Son, Inc.

Another of Respondent's customers was Launder & Son, Inc. In violation of the restraining order and in violation of the state's common law, the Teamsters Union maliciously and in wanton disregard of the rights of the Respondent, encouraged and requested Launder to cease

doing business with the Respondent (R. 52-5, 86-90, 110-1, 273, F. F. 8, R. 275-6, F. F. 13, C. L. 5, R. 285, 287). Consequently, Launder ceased doing business with the Respondent during the strike (R. 161-2, 273, F. F. 8(c)) and Respondent suffered \$8,700.00 in damages (R. 249, 274, F. F. 12).

C. DAMAGES FROM LOSS OF WILSON JOB.

Another of Respondent's customers was the Wilson Sand & Gravel Co. As a result of a combination of the Teamsters Union's primary picket line and its unlawful secondary activity violative of Section 303, LMRA and the state common law, Respondent had an insufficient number of truck drivers during the strike to perform fully his contract with Wilson and consequently, Respondent suffered damages in the amount of \$9,300.00 (R. 169-70, 183-4, 249, 274, F. F. 11, R. 276, C. L. 6).

SUMMARY OF ARGUMENT.

During the seven week strike against the Respondent, the Teamsters Union, which represented his employees, engaged in secondary activity against two of Respondent's customers and one of his suppliers. This activity violated Section 303, LMRA and accordingly Respondent is entitled to recover damages under that section. Respondent suffered \$1600.00 in damages as a result of the Teamsters Union's secondary activity against one of these customers (Schoen). The Respondent suffered additional damages as the result of not having enough drivers report to work during the strike to complete a contract with his customer Wilson. There is no evidence that any of Respondent's employees failed to work simply as the result of the Teamsters Union's lawful, primary picket line and there is uncontradicted evidence that some employees

failed to work as the result of the Teamsters Union's unlawful secondary activity. The courts below found (R. 274, F. F. 11(b)) that the Respondent lost the Wilson profit as a result of a combination of the Teamsters Union's lawful and unlawful strike activity and properly awarded judgment against the Teamsters Union for the Wilson damages as well as the O'Connel damages. The Teamsters Union cannot be heard to complain that it is impossible to determine how many truck drivers stayed away because of its unlawful secondary activity and how many stayed away simply because of its primary picket line. *Story Parchment Co. vs. Paterson Parchment Paper Co.*, 282 U. S. 555, 562-3.

The identical acts that constituted the Teamsters Union's secondary strike activity violative of Section 303, LMRA also violated Ohio's common law against secondary strike activity (R. 275, C. L. 5). The Ohio common law also outlaws a striking union appealing to the management of the struck employer's customers and suppliers for the purpose of urging such customers and suppliers to cease doing business with the struck employer. Thus, the Ohio common law (R. 275, C. L. 5) supports the lower courts' award of \$8,700.00 for Respondent's loss of the Launder job (which was lost as a result of the Teamsters Union's approaching the management of Launder and asking it to cease doing business with Respondent during the strike) as well as the \$1,600.00 O'Connel award and the \$9,300.00 Wilson award which are supported by both Section 303, LMRA and the state common law.

The state common law also provides for punitive damages where, as here, the Teamsters Union's unlawful strike activity involved malice and wanton disregard of

³ Cf. Sec. 303 LMRA which proscribed only the inducement and encouragement of employees.

Respondent's legal rights. The District Court accordingly properly awarded Respondent \$15,000.00 in punitive damages.

The Teamsters Union has challenged the jurisdiction of the lower courts to apply Ohio's common law to the facts of this case. Since, however, this case involved but one cause of action (R. 275, C. L. 3) and since the identical acts of the Teamsters Union which constituted the violation of Section 303, LMRA also constituted violations of the Ohio common law, the lower courts had pendent jurisdiction to apply the common law to the Respondent's entire cause of action. *Hurn vs. Oursler*, 289 U. S. 238, 246.

The Court's decision in *San Diego Building Trades Council vs. Garmon*, 359 U. S. 236, does not require a different result. And, in any event, even under the *Garmon* rationale, the courts below were correct in awarding all of the damages awarded because, under *Garmon*, state common law can be applied in this case since it involved imminent threats to the public order.

Finally, *Garmon* is inapplicable for the further reason that the activity for which damages have been awarded under the state common law herein was neither arguably protected nor arguably prohibited by the Labor-Management Relations Act of 1947.

ARGUMENT.

I. THE TEAMSTERS UNION'S SECONDARY STRIKE ACTIVITY VIOLATED SECTION 303, LMRA AND THE COURTS BELOW CORRECTLY AWARDED DAMAGES THEREUNDER.

Section 303, LMRA⁶ at all times here relevant, provided in part:

"(a) It shall be unlawful * * * for any labor organization * * * to induce or encourage the employees of any employer to engage in * * * a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring * * * any employer * * * to cease doing business with any other person;

* * *

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor * * * and shall recover the damages by him sustained and the cost of suit."

As summarized in the preceding statement, the District Court held that the Teamsters Union violated Section 303, LMRA (R. 275-6, C. L. 5) by conduct affecting two of Respondent's customers and one of his suppliers and the Court of Appeals affirmed (R. 295). The District Court awarded and the Court of Appeals affirmed (a) \$1600.00 in damages as resulting from the Teamsters Union's causing Respondent to lose the O'Connel work, by conduct violative of Section 303, LMRA, and (b) \$9300.00

⁶ Section 303, LMRA as it read before its amendment in 1959, is set out in full in Appendix A to this brief.

in damages resulting from the Respondent's losing the Wilson job because of not having the necessary truck driver employees available to do the work as the result of the Teamsters Union's conduct, some of which was violative of Section 303, LMRA and some of which was violative of Section 303, LMRA and the state common law.

A. The O'Connel Damages.

The day after the strike began (R. 28) Teamsters Union business agent Mowery (R. 16) went to the premises of one of Respondent's customers (O'Connel), all of whose employees just happened to be members of the Teamsters Union (R. 29), where he made a point of informing the employees of such customer (by speaking to the particular employee who just happened to be the Teamsters Union's steward⁷ for such customer's employees (R. 126, 131)) that the Teamsters Union did not want such employer to use (i.e., unload sand from) the Respondent's trucks until the strike was settled (R. 122). The O'Connel union steward promptly related this to the O'Connel management (R. 126, 136) which promptly ceased using Respondent's trucks for the duration of the strike because it did not want to risk being picketed by the Teamsters Union or having its employees go out on strike (R. 127, 129). Respondent suffered \$1600.00 in damages as the direct result of this conduct of the Teamsters Union which was proscribed by Section 303, LMRA (R. 249, 273, F. F. 8(d)).

Despite the Teamsters Union's footnote suggestion

⁷ "The fact that only a single employee was contacted would not prevent the existence of the requisite inducement of the employees as this employee was the union steward who could reasonably have been expected to transmit union instructions to his fellow employees. *NLRB vs. Local 11, Carpenters' Union*, CA-6, 1957, 242 F. (2) 932." *Wells vs. Int. Union Op. Engineers, Local 181*, CA-6, 303 F. (2) 73, 74.

(brief, pp. 30-1, footnote 22), the Teamsters Union does concede (brief, p. 30) "(f)or the purposes of argument" that the courts below were correct in holding that the Teamsters Union violated Section 303, LMRA with respect to conduct in connection with two customers (Schoen and O'Connel) and one supplier (France).

The Teamsters Union also concedes (brief, p. 30) that the lower courts were correct in assessing damages against it for Respondent's damages resulting directly from such Section 303, LMRA violations (i.e., the \$1600.00 damages suffered as a result of losing the O'Connel work (R. 249)), but contests the correctness of the lower courts' holding awarding \$9,300.00 in damages (i.e., the damages suffered as a result of losing the Wilson job) because of the Teamsters Union's secondary activity violative of Section 303, LMRA and the state common law. This point will now be discussed in detail.

B. The Wilson Damages.

The damage the Respondent suffered as a result of losing the Wilson job was occasioned by the Respondent's not having enough drivers report for work during the strike. This lack of drivers was the result of the strike having been made effective by secondary activity violative of Section 303, LMRA and the state common law.

Respondent's argument here is addressed to the Teamsters Union's argument under its Argument II. The Teamsters Union's entire argument presupposes that the Wilson job was lost "solely as a consequence of * * * a peaceful, orderly strike" (Teamsters Union's brief, page 35). As the lower courts held, however, the Wilson job was not lost solely as a consequence of a peaceful, orderly strike, but rather "as a result of the combination of (the Teamsters Union's) lawful and unlawful strike activity" (R. 274, F.

F. 11(b)), and accordingly, the Teamsters Union's argument must fail.

At the time of the strike, Wilson Sand & Gravel Co. of Upper Sandusky, Ohio was supplying sand to the V. N. Holderman Co. for its job of constructing a bypass of U. S. Route 20 around Findlay, Ohio (R. 274, F. F. 11). The Respondent had an agreement with Wilson to do the hauling of the sand being furnished by Wilson to Holderman (R. 274, F. F. 11). As a consequence of the Teamsters Union's unlawful secondary activity, the Respondent had an insufficient number of truck driver employees during the strike to perform the Wilson job (R. 274, F. F. 11). As a result of the unlawful secondary activity of the Teamsters Union at the France Stone Company premises, the Schoen Asphalt Paving premises and the Launder & Son construction site, Respondent's employees who were on strike knew that if they crossed the picket line at the Respondent's garage and went to work there, they would stand a good chance of being followed by the Teamsters Union's agents and of being encountered by the Teamster Union's agents and pickets wherever they might go for supplies or to deliver material. "This activity made the strike of the (Teamsters Union) against the (Respondent) more effective to prevent (Respondent's) employees from returning to work than it would have been but for such activity" (R. 274, F. F. 10). For example, Witness Ransom 'Taulbee, one of Respondent's employees who did not work during the strike, testified (R. 196-7) that at the time of the strike, he knew that some of his fellow employees who did go to work were followed away from the primary picket line by the Teamsters Union's business agent Evans and others. Asked what effect this sort of thing had on his deciding not to work during the strike, Taulbee testified (R. 197) over the strenuous objection of the Teamsters Union,

that he didn't want to go to work and be followed, because he was afraid of getting hurt. For every person such as Taulbee who had the courage to admit, in open court, before the officers of his union and his fellow employees, that he was afraid of getting hurt, there were undoubtedly a dozen or more others who were equally or more afraid but who would not have had the courage to admit it. We are confident the Court will fully understand the profound difference between (1) a situation where the union merely pickets the employer's factory where those who cross the picket line to go to work do so with relative personal safety because of the fact that he works within sight of many people who would witness any violence directed towards him and (2) a situation, such as the one in the instant case, where an employee who went to work and drove a truck through the picket line stood a good chance of being followed down a lonely road to a rural gravel pit by automobiles loaded with striking union men, just as some of the Respondent's loyal employees were followed to the gravel pit at Maple Grove, Ohio (R. 56-60).

Thus the Respondent has introduced credible testimony to the effect that lack of drivers was caused by the Teamsters Union's unlawful activity in following Respondent's drivers who did work during the strike, and in unlawfully picketing at secondary sites. *The Teamsters Union introduced no testimony whatever to the contrary.* The Teamsters Union did not have a single one of its members who struck against the Respondent testify that he stayed away from work simply because of the picket line at Respondent's garage. In view of the uncontradicted testimony supporting the Respondent's position, the courts below were clearly correct in assessing and affirming damages with respect to Respondent's loss of the Wilson job.

The Teamsters Union asks this Court, as it unsuccessful-

fully asked the courts below, to naively accept its tongue-in-cheek argument that the Respondent had an insufficient number of drivers to perform the Wilson job as a proximate result of the primary strike. It should be sufficient to observe that the picket line at Respondent's garage was obviously not effective to prevent Respondent's truck drivers from going to work since the Teamsters Union found it necessary to (1) follow and thereby coerce Respondent's drivers who did go to work (R. 196-7, 274, F. F. 10), (2) picket at Respondent's customers' and suppliers' premises (R. 26-52, 59, 85-6, 284), (3) induce and encourage the employees of Respondent's customers and suppliers to engage in a concerted refusal in the course of their employment to load and unload Respondent's trucks, for the purpose of forcing or requiring such customers and suppliers to cease doing business with the Respondent (R. 121, 122, 126, 127, 272-3, F. F. 7, R. 284-5), and (4) urge Respondent's customers and suppliers to cease doing business with the Respondent for the duration of the strike, all in an effort to make the strike effective. The strike was made effective by these described activities, some of which were violative of Section 303, LMRA, some of which were violative of the state common law and some of which were violative of both.

The most that can possibly be correctly said for the Teamsters Union's position is that it is uncertain as to how many of Respondent's truck drivers failed to report to work during the strike because of (1) the Teamsters Union's secondary activity violative of Section 303, LMRA, (2) the Teamsters Union's secondary activity violative of the state common law, or (3) only because of the picket line at Respondent's garage. *The Teamsters Union introduced no testimony of any driver-employees, if there were any, who stayed away ONLY because of the picket line at Re-*

spondent's garage. The District Court found as a fact that the Wilson job was lost as a result of a combination of the Teamsters Union's lawful and unlawful strike activity (R. 274).

If there is any uncertainty about the Wilson element of damages, i.e., the number of Respondent's drivers who failed to report to work for duty on the Wilson job because of (1) the Teamsters Union's unlawful secondary activity on the one hand and (2) the Teamsters Union's picket line at Respondent's garage on the other, then not the Respondent but the wrongdoer, the Teamsters Union, should suffer the consequences of the uncertainty being resolved against it.

In *Story Parchment Co. vs. Paterson Parchment Paper Company*, 282 U. S. 555, 562-3, this Court held:

"* * * Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relieve the wrongdoer from making any amends for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

The principle that a wrongdoer will not be permitted to complain that damages cannot be measured with exactness, where he is responsible for the confusion as to the amount thereof, has been applied by this Court in a variety of situations. In *Bigelow vs. RKO Radio Pictures*, 327

U. S. 251, the defendants in that antitrust damage action argued that it was impossible to establish any measure of damages, because the unlawful system which they created precluded the petitioners from proving what profits were lost solely as the proximate cause of the defendant's acts. There this Court said (327 U. S. at 265): "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," citing *Package Closure Corp. vs. Sealright Co.*, 2 Cir., 141 F. 2d 972, 979, and *Armory vs. Delamirie*, 1 Strange 505.

This Court observed in the *Bigelow* case that the principle here discussed is not restricted to proof of damage in antitrust suits and that in cases of collisions where the offending vessel has violated regulations prescribed by statute and in cases of confusion of goods, the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. *The Pennsylvania*, 19 Wall 125, 136, 22 L. Ed. 148; *Great Southern Gas and Oil Co. vs. Logan Natural Gas & Fuel Co.*, 6 Cir., 155 F. 114, 115.

In *Bigelow* this Court further observed that in cases where the wrongdoer has incorporated the subject of plaintiff's patent or trade-mark in a single product to which the defendant has contributed other elements of value or utility, and has derived profits from the sale of the product, this Court has sustained recovery of the full amount of defendant's profits where his own wrongful action has made it impossible for the plaintiff to show in what proportions he and defendant have contributed to the profits. *Westinghouse Electric & Mfg. Co. vs. Wagner Electric &*

Mfg. Co., 225 U. S. 604; *Hamilton-Brown Shoe Co. vs. Wolf Brothers & Co.*, 240 U. S. 251.

Accordingly, in the instant case, where the Teamsters Union is the wrongdoer, it cannot be permitted to complain that it is impossible to determine how many truck driver employees of the Respondent failed to report for work during the strike because of (1) its unlawful secondary activity violative of Section 303, LMRA, or the state common law, or both, on the one hand and (2) its primary picket line, at Respondent's garage terminal, on the other. Respondent is entitled to recover the full amount of his profits (\$9300) which he lost as a result of not having enough truck drivers available during the strike to perform the Wilson job. *Westinghouse Electric & Mfg. Co. vs. Wagner Electric & Mfg. Co.*, 225 U. S. 604; *Hamilton-Brown Shoe Co. vs. Wolf Brothers & Co.*, 240 U. S. 251.

The District Court in the instant case properly relied upon *Carpenters Union vs. Cisco Construction Co.*,⁸ 9 Cir., 266 F. 2d 365, cert. den. 361 U. S. 826, where the following is found at page 367:

"Generally, it may be said that the away-from-the-job-site pressure, if it must be uncommingled with the job site picketing, did no substantial damage. The damage which Cisco did suffer would appear to have been caused because the subcontractors' union men just would not cross the picket lines at the job sites. The trial court expressly found that the first picket line as

⁸ The application of the totality of effort rule in this case is consistent not only with the *Cisco* case but also with *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862. In its petition for certiorari in that action (Case No. 292, October, 1962 term) the union pointed out that in the lower courts the employer had relied upon the *Cisco* case "to support the totaling of damages" and that such courts had totalled and awarded damages for legal and illegal picketing.

originally established was not illegal. And we think it implicit in the Court's decision, findings of fact and conclusions of law, that if there had been nothing more than picketing, without the addition of other activity directed at or through the subcontractors, then recovery might have been denied. So it appears that the primary question here is whether we may take a concept of the totality of effort, charging all damage to the defendants."

The Court of Appeals in the Cisco case stated the question in a slightly different manner on page 370:

"So the test is not merely: Is there a picket line? But: What is the object and what is whole situation?"

The same Court of Appeals stated its conclusion on the same page:

"* * * The totality of the effort may be considered and shows that when one of the real objects becomes to reach the contractor through an innocent third party (by concerted action, of course), then he who has suffered may recover."

In the Cisco case and in the instant case, the lower courts have done no more than to properly apply the principles established by this Court in the *Story Parchment* and similar cases.

The Teamsters Union must, of course, attempt to avoid the obvious effect upon it of the application of the rationale of *Story Parchment* and related cases and of the "totality of the effort" rule which the Ninth Circuit Court of Appeals in the Cisco case found to be based upon four United States Supreme Court cases.⁹ The Teamsters Union

⁹ *NLRB vs. International Rice Milling Co., Inc.*, 341 U. S. 665, 71 S. Ct. 961; *NLRB vs. Denver Building and Construction Trades Council*, 341 U. S. 675, 71 S. Ct. 943; *International Brotherhood of Electrical Workers vs. NLRB*, 341 U. S. 694, 71 S. Ct. 954; *Local 74, United Brotherhood of Carpenters vs. NLRB*, 341 U. S. 707, 71 S. Ct. 966.

has attempted to avoid application of the "totality of effort" rule by citing two cases that have little or nothing to do with the precise question which the Cisco case decided. The Teamsters Union refers (Br. pp. 42-3), first, to a non-damage NLRB unfair labor practice case, *Local Union No. 175, Teamsters vs. NLRB*, U. S. Court of Appeals, District of Columbia, 294 F. 2d 261, where the entire per curiam decision is as follows:

"In aid of a strike against McJunkin Corporation in Charleston, West Virginia, the union (1) picketed its plant, (2) told employees of neutral trucking concerns over the telephone, that the plant was picketed, expressly or impliedly asking them to respect the picket line, and (3) at the premises of one neutral concern, Miami Transportation Company, induced its employees not to unload a McJunkin truck for transshipment. This last was a clear violation of Section 8(b) (4) (A) of the National Labor Relations Act as amended, 29 U. S. C. A. Section 158(b) (4) (A), but there was no evidence that any other action of the union had any illegal purpose or effect. The Board's order is apparently intended to prevent the union from inducing employees of any trucking concern to respect the picket line at McJunkin's plant. *But peaceful primary picketing and its normal incidents, including request to neutrals not to cross the picket line, cannot be forbidden though the union has acted illegally elsewhere.* The case will be remanded to the Board with directions to modify its order so that it will not be broader than the one the Hearing Examiner has recommended. As so modified, the order will be enforced." (Emphasis added.)

It is immediately clear that this case presented to the Court of Appeals the *sole question of whether lawful strike activity can be enjoined where the offending union is also engaged in unlawful secondary activity.* If the case before

this Court presented the question of whether the primary picketing at the Respondent's garage and office premises could be enjoined because the Teamsters Union had engaged in unlawful secondary activity at the France Stone Company and elsewhere, the *Local Union No. 175* case would be relevant. We certainly agree that the *Local Union No. 175* case is correct. We have always thought so. This is indicated by the fact that the Respondent did not ask the Court of Common Pleas of Seneca County, Ohio, or the NLRB to enjoin peaceful primary picketing at Respondent's garage and office premises during the strike, but only asked the Common Pleas Court to enjoin the unlawful secondary activity and mass picketing. Accordingly, the *Local Union No. 175* case has no application at all to the instant case. The courts below correctly held that in this *damage* action, the Court should apply the "totality of the effort" rule.

If the primary picketing at Respondent's garage and office premises did result in some of Respondent's drivers not reporting to work for duty on the Wilson job, the fact is that the Teamsters Union made no attempt to prove how many of Respondent's truck drivers stayed away from work merely because of the Teamsters Union's lawful activities and the District Court found that Respondent lost the Wilson job because of having an insufficient number of truck drivers as a result of the Teamsters Union's lawful and unlawful strike activity (R. 274, F. F. 11(b)). The District Court thus found as a fact that the Wilson job was lost because of a combination of the Teamsters Union's (1) lawful activity and (2) unlawful activity which consisted of (a) picketing and other forms of inducements of the Respondent's customers' and suppliers' employees for purposes violative of Section 303, LMRA and (b) inducements of Respondent's customers and suppliers

direct, to cease doing business with the Respondent, in violation of the state common law (R. 275, F. F. 5). On principle and authority¹⁰ Respondent should be awarded the Wilson damages under Section 303, LMRA. This is so, regardless of whether this Court determines that the courts below were correct in applying the state's common law, which also supports the same damage award.¹¹

II. THE TEAMSTERS UNION'S SECONDARY STRIKE ACTIVITY ALSO VIOLATED OHIO'S COMMON LAW AND BASED THEREON THE COURTS BELOW CORRECTLY AWARDED PUNITIVE (\$15,000.00) AND COMPENSATORY (\$8,700) DAMAGES IN ADDITION TO THE O'CONNEL (\$1,600.00) AND WILSON (\$9,300.00) DAMAGES THAT ARE SUPPORTED BY THE STATE COMMON LAW AND SECTION 303, LMRA.

At this point we shall briefly demonstrate that the Teamsters Union's secondary strike activity violated Ohio's common law and that, assuming for the moment that the courts below were correct in holding that Ohio's common law can be applied to the facts in this case, such courts correctly awarded punitive damages and compensatory damages under such common law. In the next part of our brief, we shall consider the Teamsters Union's argument that the lower courts erred in applying Ohio's common

¹⁰ *Story Parchment Co. vs. Paterson Parchment Paper Co.*, 282 U. S. 565; *Bigelow vs. RKO Radio Pictures*, 327 U. S. 251; and *Carpenters Union vs. Cisco Construction Co.*, 266 F. (2) 365, cert. den. 361 U. S. 826.

¹¹ 33 *Ohio Jurisprudence* (2) Section 64, *Secondary Boycott*, pages 187-8; *Moore & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547 (1947); *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541, 104 N. E. (2) 22; *Temple McAllister vs. Trumbull County Bldg. Trades Council*, 12 O. O. 179; and *Bell vs. Rogers*, 107 N. E. (2) 136.

law to such facts because of the Teamsters Union's pre-emption argument.

The common law of Ohio is that appeals by a striking union to the struck employer's customers and suppliers, urging cessation of business by those customers and suppliers with the struck employer, are unlawful and this is so whether or not the striking union appeals to such customers' or suppliers' employees; and damages may be awarded the struck employer for the losses suffered. 33 *Ohio Jurisprudence* (2) Section 64, Secondary Boycott, pages 187-8; *Moore & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547; and *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541. Further, the common law of Ohio is to the effect that punitive damages may be awarded in tort actions which involve malice or the wanton disregard of the legal rights of others; 16 *Ohio Jurisprudence* (2): Damages, Section 145, Tort Actions Generally, page 281; *Smithhisler vs. Dutter*, 157 O. S. 454, 105 N. E. (2) 868 (1952).

As the lower courts held (R. 275-6, C. L. 5 and 6; R. 295), the compensatory damages awarded the Respondent for the Teamsters Union's violations of Section 303, LMRA (i.e., lost profit from O'Connell, \$1,600.00; and lost profit from Wilson, \$9,300.00) are supported by the state common law as well as by Section 303, LMRA. As further held by the lower courts (R. 275-6, C. L. 5 and 6; R. 295), the state common law also requires that compensatory damages be awarded Respondent for his loss of the Launder profit (\$8,700.00). As the Teamsters Union concedes (brief, p. 12), such profit was lost as the result (R.

273) of the Teamsters Union successfully asking the management of Launder direct (no Launder employees were induced or encouraged) to cease doing business with the Respondent during the strike. This secondary activity violated the state common law, though it did not violate Section 303, LMRA.

The Teamsters Union does not dispute (brief, p. 13) that the Ohio common law, if its applicability has not been preempted by the LMRA, authorized the lower courts to award (R. 275, F. F. 14) and affirm (R. 295) punitive damages in the amount of \$15,000.00. The punitive damages were awarded because of the intentional malice and wanton disregard of Respondent's legal rights that were found by the lower courts to have accompanied the Teamsters Union's unlawful secondary strike activity (R. 275, F. F. 13).

Since the state common law, if its applicability has not been preempted by the LMRA, justifies and supports all of the compensatory damages (part of which (O'Connel, \$1,600.00 and Wilson, \$9,300.00) are supported independently by Section 303, LMRA) and punitive damages awarded to the Respondent herein, we now come to our consideration of the Teamsters Union's preemption argument.

III. THE FEDERAL DISTRICT COURT HAD PENDENT JURISDICTION TO AWARD COMPENSATORY AND PUNITIVE DAMAGES TO RESPONDENT UNDER THE OHIO COMMON LAW.

The courts below held (R. 275, C. L. 3; R. 292) that the Respondent's claim of unlawful secondary activity violative of Section 303, LMRA and Respondent's claim of unlawful activity violative of the common law of Ohio are not separate causes of action but merely different

grounds to support a single cause of action, the cause of action being the violation by the Teamsters Union of the Respondent's right to be free from unlawful interference with his business. In *Hurn vs. Oursler*, 289 U. S. 238, this Court held (p. 246) that when a case presents a substantial federal question, the trial court has jurisdiction to dispose of all grounds, either federal or state, which are in support of a single cause of action. There, a suit was filed in the United States District Court seeking redress for copyright infringement which raised a substantial federal question and sought to obtain relief, as well, upon the ground that identical acts constituting the alleged infringement were also unfair competition under the state law. It was held by this Court that the federal question raised by the pleadings gave the court jurisdiction; and that, although the federal claim was rejected on the merits, the district court still possessed jurisdiction to decide the claim of unfair competition on the merits.¹²

The Teamsters Union accuses (Br., p. 29-30) the lower courts of misreading and misapplying *Hurn vs. Oursler*, 289 U. S. 238. It is the Teamsters Union, however, that has misread and misapplied that case to the facts of this case. This Court, in the *Hurn* case, drew a distinction (289 U. S. 246) between one cause of action resting on identical facts and different causes of action resting on different facts and held that a federal court may retain jurisdiction and apply a state's common law only in the former case. Here the Teamsters Union argues (Br., p. 29) that "Respondent's proof of loss of the Launder account rested on a set of circumstances wholly separate and distinct from his proof of alleged Section 303 viola-

¹² The case now before the Court is stronger for the Respondent than the *Hurn* case because here the federal claim was not rejected on the merits. The Teamsters Union has been found to have violated Section 303, LMRA.

tions. Different times, places and persons were involved." But the Teamsters Union fails to consider the District Court's Findings of Fact and Conclusions of Law on this point. It will be recalled that the District Court found (R. 272-5, F. F. 6(b), 7(b) and 9(b), C. L. 5) that the identical acts of the Teamsters Union that constituted violations of Section 303, LMRA with respect to Respondent's customers O'Connel and Schoen and Respondent's supplier France also constituted violations of the state common law. This case then falls squarely within the rationale of *Hurn vs. Oursler*.

Further, as this Court observed in *Hurn vs. Oursler*, 289 U. S. at 246, "A cause of action does not consist of facts but of the unlawful violation of a right which the facts show." Thus, Respondent's common law cause of action does not consist of the facts pertaining solely to the Launder matter or solely to one or more of the O'Connel, Schoen, and France matters. As the District Court found:

"The claim of unlawful secondary activity violative of 29 U. S. C. A., Section 187, and unlawful secondary activity violative of the common law of Ohio are not separate causes of action but are merely different grounds to support a single cause of action, the cause of action being the violation by the Defendant of Plaintiff's right to be free of unlawful interference with his business." (R. 275, C. L. 3.)

Since the identical acts of the Teamsters Union involving Respondent's customers Schoen and O'Connel and Respondent's customer France resulted in violations of Section 303, LMRA and the state common law, the District Court had jurisdiction to apply the state common law to Respondent's entire cause of action. Since the Launder element of damages was merely a part of the single cause of action, the District Court had pendent jurisdiction to grant damages under the state common law.

As indicated by the cases cited in the footnote,¹³ the doctrine of ancillary or pendent jurisdiction is a rule of

¹³ The doctrine of ancillary or pendent jurisdiction has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn vs. Oursler*, *supra*; *Armstrong Paint and Varnish Works vs. Nu-Enamel Corp.*, 305 U. S. 315 (1939); *In re Amtorg Trading Corp.*, 75 F. (2) 826 (Ct. of Patent App., 1935); *Edelmann & Co. vs. AAA Specialty Company*, 88 F. (2) 852 (C. A. 7, 1937); *Sinko vs. Snow-Craggs Corporation*, 105 F. (2) 450 (C. A. 7, 1939); *Maternally Yours vs. Your Maternity Shop*, 234 F. (2) 538 (C. A. 2, 1956).

(2) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company vs. Van Hoosear*, 72 F. (2) 903 (C. A. 9, 1934); *Strachman vs. Palmer*, 177 F. (2) 427 (C. A. 1, 1949); *Chicago Great Western Railway Co. vs. Chicago, Burlington and Quincy Railway Co.*, 193 F. (2) 975 (C. A. 8, 1952).

(3) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion vs. Connell*, 236 F. (2) 447 (C. A. 9, 1956); *Jung vs. K & D Mining Co.*, 260 F. (2) 607 (C. A. 7, 1958).

(4) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *South Side Theatres vs. United West Coast Theatres Corporation*, 178 F. (2) 648 (C. A. 9, 1949); *Braddick vs. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(5) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company vs. Owensboro Milling Company*, 222 F. (2) 109 (C. A. 6, 1955).

(6) In cases wherein a claim against a labor union under Section 303, LMRA, is combined with a claim for compensatory and punitive damages under state common law in such cases as *United Mine Workers vs. Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6, 1959) cert. den. 359 U. S. 1013; *William G. Gilchrist, Jr., et al. vs. United Mine Workers*, 290 F. (2) 36 (C. A. 6, 1961), cert. den. 368 U. S. 875; *United Mine Workers vs. Osborne Mining Co., Inc.*, 279 F. (2) 716 (C. A. 6, 1960), cert. den. 364 U. S. 881; and *Flame Coal Company vs. United Mine Workers*, 303 F. (2) 39 (C. A. 6, 1962), cert. den. 371 U. S. 891.

general application which has been applied in a great variety of types of cases. The Teamsters Union argues, however (Br., p. 27) that "Pendent jurisdiction assumes the existence of a state ground in support of a federal claim" and (Br., p. 28) "Since the state courts had no jurisdiction over Respondent's common law claim, the federal courts had none."

Although the Court of Appeals below specifically stated (R. 293) that it was not deciding that a state court is preempted from entertaining such a suit as this and awarding damages under the state common law, it further stated that "A nonfederal cause of action is not extinguished because a state court is preempted by federal law from providing relief." The Court of Appeals below also said (R. 292):

"(The Teamsters Union) contends that a federal court is without jurisdiction to entertain a suit for damages based on a secondary boycott unlawful under state law even though the suit also seeks damages under Section 303 for an unlawful secondary boycott. This contention is directly contrary to the holding in the 1933 decision of *Hurn v. Oursler*, 289 U. S. 238, as well as that in a number of recent cases decided by this court. Included among these are *Flame Coal Company v. United Mine Workers of America*, 303 F. 2 39 (6 Cir., 1962); *White Oak Coal Company v. United Mine Workers of America*, decided May 24, 1963, -- F. 2 -- (6 Cir.); *United Mine Workers of America v. Meadow Creek Coal Company*, 263 F. 2 52 (6 Cir., 1959), certiorari denied, 359 U. S. 1013; and *United Mine Workers of America v. Osborne Mining Co.*, 279 F. 2 716 (6 Cir., 1960), certiorari denied, 364 U. S. 887. (The Teamsters Union) contends that since there was no violence in the instant case a different rule applies. We are not aware of such a distinction and in fact are unable to appreciate any legal or

logical reason for such a jurisdictional distinction

* * *

Although there was actual violence involved in the *Meadowcreek*, *White Oak*, *Flame* and *Osborne* cases, jurisdiction of the federal court to grant damages under state common law was not founded upon such violence but upon the rationale of *Hurn vs. Oursler*, 289 U. S. 238.¹⁴ Thus, the Court of Appeals below correctly held that the District Court had jurisdiction to award compensatory and punitive damages under the state common law.

We submit, however, that, in any event, the state court could have properly granted exactly the same relief herein as was granted by the District Court below.¹⁵ The Teamsters Union's argument (Br., p. 16 et seq.) is based primarily upon this Court's decision in *San Diego Building Trades Counsel vs. Garmon*, 359 U. S. 236 and we proceed to our consideration of that argument.

¹⁴ See *United Mine Workers of America vs. Meadow Creek Coal Company*, 263 F. (2) at 60; *United Mine Workers of America vs. Osborne Mining Co.*, 279 F. (2) at 724; *Flame Coal Company vs. United Mine Workers of America*, 303 F. (2) at 42; and *White Oak Coal Company vs. United Mine Workers of America*, 318 F. (2) at 606.

¹⁵ The Court of Appeals below implied (R. 293) that the state court erred in holding that it did not have jurisdiction of this action and Respondent now subscribes to the Court of Appeals' proposition. In any event, the state court correctly understood that the federal courts would have jurisdiction of this cause of action which is based upon violations of Section 303, LMFA and the state common law. Accordingly, the state court dismissed the action " * * * without prejudice to a new action based upon the subject matter * * * " (R. 266).

A. The Union Activity for Which the District Court Granted Compensatory and Punitive Damages Under the State Common Law Involved Imminent Threats to the Public Order and Accordingly Such Damages Were Properly Awarded Thereunder.

The Teamsters argument¹⁶ as to the absence of actual violence in this case requires consideration of *San Diego Building Trades Counsel vs. Garmon*, 359 U. S. 236 (1959); *International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Russell*, 356 U. S. 635 (1958); *United Construction Workers, etc. vs. Laburnum Construction Corp.*, 347 U. S. 656 (1954); and *Youngdahl, etc. vs. Rainfair, Inc.*, 355 U. S. 131 (1957).¹⁷

The *Garmon* case of course held that the California state court could not grant a monetary judgment against a union for violation of the state's statutory law; where the union's conduct was peaceful and involved no imminent threats to the public peace and order. In *Garmon* (359 U. S. at 247) this Court said:

"It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Russell*, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; *United Construction Workers, etc. v. Laburnum Const. Corp.*, 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025. We have also allowed the States to enjoin such conduct. *Youngdahl vs. Rainfair, Inc.*, 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed.

¹⁶ Referred to on page 21 of its brief.

¹⁷ It must be remembered, however, that Section 303, LMRA, was not involved in *Garmon*, *Russell*, *Laburnum* and *Youngdahl*, whereas the Teamsters Union has violated Section 303, LMRA, in this case.

2d 151; *United Automobile, Aircraft and Agricultural Implement Workers, etc. vs. Wisconsin Employment Relations Board*, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."

If, as the Teamsters Union contends, *Garmon* (together with the *Laburnum*, *Russell* and *Youngdahl* cases discussed therein) is authority to be applied here, that authority must be applied properly and not as the Teamsters Union suggests. The *Garmon*, *Laburnum*, *Russell* and *Youngdahl* cases hold that state courts applying state law cannot enjoin or award damages against unions for conduct arguably constituting an unfair labor practice under the Labor Management Relations Act unless there is either violence or an imminent threat to the public order. The *Garmon* case involved neither violence nor an imminent threat to the public order. The *Laburnum*, *Russell* and *Youngdahl* cases, like the instant case, involved no actual physical violence but did involve imminent threats to the public order. The nature of the conduct involved in *Laburnum* and *Russell* is reviewed in footnote 4 of each decision where it appears that although there were threats there was no actual physical violence.

In *Laburnum*, which affirmed a state court award of \$175,000.00 in compensatory and \$100,000.00 in punitive damages against a union which by threats but not by physical violence, demanded that plaintiff's employees join the union, with the result that the employer had to abandon its work, this Court held, 347 U. S. at 664, that Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages caused by tortious conduct involving threats to

the public order even though such conduct constituted an unfair labor practice under the Labor Management Relations Act.

As this Court observed in *Laburnum* (347 U. S. 666), under the National Labor Relations Act of 1935, there were no prohibitions of unfair labor practices on the part of labor organizations, but there would have been no doubt that labor organizations would have been held liable in tort actions for the type of activity involved in this case. "The 1947 Act has increased, rather than decreased, the legal responsibilities of labor organizations. Certainly that Act did not expressly relieve labor organizations from liability for unlawful conduct" (347 U. S. 666). Further, *Laburnum* reminds us (347 U. S. 669) that if a state law cannot be applied in a case of this type, the offenders, by coercion, may destroy property without liability for the damage done.

In *Russell*, which affirmed a state court award of compensatory and punitive damages in a total amount of \$10,000.00 against a union, in an action arising out of conduct violative of the Labor Management Relations Act where, by intimidation but not by actual physical violence, the union denied a worker access to a plant during a strike, this Court held, 356 U. S. 641-2, that the fact that the Labor Management Relations Act provided a means of "partial" relief by way of a monetary award of back pay, did not preclude a victim of a common law tort involving intimidation and threats to the public order from a common law action for all damages suffered. Likewise, in this case, the fact that the Labor Management Relations Act provided a measure of partial relief by way of a suit for damages for certain types of secondary activity will not preclude a victim of the common law tort of secondary boycott activity involving intimidation and threats to the

public order, from a common law action for all damages suffered.

Russell did not involve any actual violence. Like the part of this case that is based on Ohio's common law, *Russell* involved "threats of violence" (356 U. S. 638), and was an action for compensatory and punitive damages for a "willful and malicious" (356 U. S. 636) common law tort. There is nothing in the *Russell* opinion to indicate that *Russell*, or any of the 29 other employees who had filed similar cases arising out of the same strike (356 U. S. 656) had any fear for their personal safety. The activity complained of in this case caused employees, understandably, to be concerned for their safety (R. 274, F. F. 10). The union conduct complained of in *Russell* took place at the scene of the primary picket line (356 U. S. 636) and not at isolated rural gravel pits, as in this case (R. 46-52, 73, 97-8, 104).

In *Youngdahl*, this Court approved the issuance of a state court injunction to the extent that it enjoined a striking union that had not engaged in actual violence against conduct consisting of verbal insults and name calling that was calculated to provoke violence. In that case the union relied heavily on the argument that there had been no actual violence but this Court held (355 U. S. at 138) that the issue was whether "the conduct and language of the strikers were likely to cause physical violence" (emphasis added); that words can readily be so coupled with conduct to provoke violence; and that the trial court "was in a better position (than this Court) to assess the local situation (and to conclude that) the conduct and massed name calling by petitioners were calculated to provoke violence and were likely to do so unless promptly restrained."

The Teamsters Union's Intimidation and Threats to the Public Order.

Although the instant case did not involve actual physical violence, it certainly involved "imminent threats to the public order." The strike commenced August 17, 1956 (R. 270, F. F. 2). On the first day of the strike the Teamsters Union sent 25 to 30 men (R. 44) to picket the Respondent's premises and this number of pickets was approximately half the size of Respondent's entire work force. The picketing continued the second day of the strike with approximately the same number of pickets involved (R. 46).

When it became apparent that the Teamsters Union's activity at the primary picket line was not going to be effective to cripple the Respondent's business, the Teamsters Union caused some of the employees that did go to work to be followed in automobiles by strikers and agents of the Teamsters Union. Two of Respondent's employees (R. 82 and 102) testified that on the third day of the strike they reported for work and were followed by automobiles driven by Teamsters Union agents and members as they left Respondent's premises and as they went to a rural gravel pit to load sand and that such following continued all of the way to Toledo, Ohio, where Teamsters Union pickets met the Respondent's truck drivers at Respondent's customer's premises, with picket signs at such customer's gate (R. 56-60, 81-86, 133-145).

The trailing of lone truck drivers down country roads by carloads of Teamsters Union agents and strikers was well calculated to intimidate and threaten such truck drivers. This course of action by the Teamsters Union was effective to cause an employee who did not want to risk getting hurt from crossing the picket line to report to work (R. 274, F. F. 10).

On the fourth day of the strike, August 21, 1956, the Common Pleas Court of Seneca County, Ohio considered it necessary to issue an order against the Teamsters Union with respect to the strike involved in this action and ordered the Teamsters Union to refrain from engaging in mass picketing, from secondary boycott activity and from following the Respondent's employees on the public highways or elsewhere (R. 270-1, F. F. 3).

The Respondent's employees never knew when they might next be encountered by Teamsters Union agents because such employees knew that the strike activity was not being confined to the Respondent's premises. In violation of the restraining order (R. 272, F. F. 6), the state common law and Section 303, LMRA,¹⁸ the Teamsters Union engaged in picketing at the premises of Respondent's customer, The France Stone Company. The Teamsters Union also requested the employees of France, by contacting the union steward of those employees, to force their employer to cease doing business with the Respondent (R. 46-52, 73, 97-8, 104).

In violation of the restraining order (R. 139) and the

¹⁸ The Teamsters Union's secondary picketing at the France stone quarry continued for at least two full days and only a few of Respondent's trucks made trips to that quarry during those two days (R. 46-52, 104) and remained there only long enough to be loaded with sand or gravel. Thus, the Teamsters Union engaged in secondary picketing at the France stone quarry when Respondent's trucks were not there and when picketing was being conducted at Respondent's garage terminal. Even when Respondent's trucks were on the France premises, the secondary pickets were considerable distances from and not within sight of such trucks, except as such trucks passed through the quarry gates. Such secondary picketing violates Section 8(b)(4)(A), LMRA. *Schultz Refrigerated Service*, 87 NLRB No. 82; *Moore Dry Dock Co.*, 92 NLRB No. 93; Cf.: *Brownfield Electric, Inc.*, 145 NLRB No. 113. As the Teamsters Union observes (Br. page 36, footnote 27) union conduct that violates Section 8(b)(4) also violates Section 303. *Longshoremen vs. Juneau Corp.*, 342 U. S. 237, 244.

state common law, the Teamsters Union approached the management of the Respondent's customer, Schoen, two or three times during the strike, and encouraged Schoen to cease doing business with the Respondent during the strike (R. 133-145).

Further, the Teamsters Union, in violation of the restraining order (R. 87) and the common law of Ohio, approached the management of the Respondent's customer Launder and requested such customer to cease doing business with the Respondent during the strike (R. 52-5, 86-90, 110-1).

As the result of the intimidation described above, it was unnecessary for the Teamsters Union to engage in actual violence.

The Teamsters Union filed a motion in the state court to dissolve the restraining order on August 24, 1956, but the state court considered it necessary to keep the order in full force throughout the strike and the restraining order was not dismissed until the strike was settled, in October of 1956 (R. 238).

The trial court found (R. 275, F. F. 13-14) that the Teamsters Union's strike activity that violated the Ohio common law (some of which violated Section 303, LMRA) was undertaken "intentionally, maliciously and with wanton disregard of the legal rights of (the Respondent) and others" and awarded \$15,000.00 in punitive damages. The trial court stated (R. 289) that although the punitive damages awarded in the *Meadow Creek* (263 F. (2) 52, 55, \$100,000) and *Osborne* (279 F. (2) 716, 719, \$50,000) "were predicated upon the extreme violence that pervaded the strikes, we see no reason why the award of punitive damages should be limited to cases where violence is engaged in." With respect to punitive damages, the Court of Appeals said (R. 296):

"As to the punitive damage award of \$15,000.00, we cannot say that there was an abuse of discretion. The fact that the activities here engaged in did not involve violence does not entitle defendants to absolution from punitive damages. Had there been violence it may well be that punitive damages in a much greater amount would be justifiable."

Surely this Court will agree that the massed name calling that occurred at the *primary* picket line in the *Youngdahl* case was not as likely to provoke violence and threaten the public order as the unlawful *secondary* activity involved in this case. A *non-striking employee* accompanied by other *non-striking employees*, crossing a picket line while being subjected to name calling and indecent gestures (as happened in *Youngdahl*) is not nearly as vulnerable to actual violence as is a *non-striking employee* who alone leaves the *primary* site in a truck to be followed by strikers and to be alone encountered by other strikers at rural gravel pits.

Accordingly, if, as the Teamsters Union argues, the preemption decisions of this Court are to be analyzed and categorized as to the presence or absence of intimidation and threats to the public order, this case must be placed alongside *Laburnum*, *Russell* and *Youngdahl* which involved intimidation and threats to the public order and not with *Garmon*, *supra*, *Electrical Workers Local 426 vs. Baumgartners Elec. Constr. Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 273, 91 N. W. 2d 663, and *Overnight Transportation Co. vs. Teamsters*, 257 N. C. 18, 125 S. E. 2d 277, cert. den. 371 U. S. 862, relied upon by the Teamsters Union in its petition for certiorari, which did not involve significant intimidation or threats to the public order.

Certainly, the intimidation and threats to the public order were as serious in this case as in *Laburnum*, *Russell*

and *Youngdahl*. The state court here considered it necessary to issue an order restraining mass picketing and secondary activity, which order was kept in effect throughout the strike, despite the Teamsters Union's efforts to have it removed. The federal District Court in this action concluded that the maliciousness and unlawfulness of the Teamsters Union's activities warranted granting punitive damages. The Court of Appeals agreed and noted that if the Teamsters Union had resorted to violence in addition to malicious violations of federal and state law greater punitive damages would probably have been justified. Finally, as this Court has said (*Youngdahl, etc. vs. Rainfair, etc.*, 355 U. S. 131, 138), the trial court was in a better situation than this Court presently is, to assess the local situation and to determine that the union conduct involved was calculated to provoke violence, with the result that the LMRA does not preempt the application of state common law thereto.

B. The Union Activity for which the District Court Granted Compensatory and Punitive Damages Under the State Common Law Was Neither Arguably Protected Nor Arguably Prohibited by the Labor Management Relations Act and Accordingly Such Damages Were Properly Awarded.

Here we shall start with and apply the *Garmon* principle that "When an activity (other than an activity subject to the prohibitions of Sections 301 and 303, LMRA)¹⁰ is arguably subject to Section 7 or Section 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the NLRB." *San Diego Building Trades*

¹⁰ The Teamsters Union in its brief, page 23, indicates, in effect, that this parenthetical phrase must be read into the *Garmon* principle. We agree.

Council, etc. vs. Garmon, 359 U. S. 236, 245. Since its decision in *Garmon*, this Court has been consistently careful to examine the facts in each labor case in which the question of state vs. federal jurisdiction has arisen, to determine whether the complained of activity was arguably protected or arguably prohibited by the LMRA.²⁰

According to *Garmon*, 359 U. S. 236, 246, if the NLRB has clearly determined or if "compelling precedent applied to essentially undisputed facts" establishes that the complained of activity is neither protected nor prohibited by LMRA, state jurisdiction (and state common law) may properly be applied.²¹ We submit that compelling precedent applied to the undisputed facts of this case establishes that the union activity here complained of was neither arguably protected nor arguably prohibited by the LMRA, with the result that compensatory and punitive damages were properly awarded therefor under the Ohio common law.

The Undisputed Facts.

The undisputed facts, with respect to the Teamsters Union's secondary activity that was violative of the state common law but not Section 303, LMRA, were, in part, as stated in the Teamsters Union's brief:

²⁰ For example: *In re: Green* (1962), 369 U. S. 689, 692-3; *Marine Engineers, etc. vs. Interlake Steamship Co.* (1962), 370 U. S. 173, 177-8; *Ex parte George* (1962), 371 U. S. 72, 73; *Local 438, etc. vs. Curry* (1963), 371 U. S. 542; *Inces Steamship Co. vs. International Maritime W. U.* (1963), 372 U. S. 24, 26-7; *Local 100 vs. Borden* (1963), 373 U. S. 690, 693-4; *Local 207, Iron Workers, etc. vs. Perko* (1963), 373 U. S. 701, 707; *Retail Clerks vs. Schermerhorn* (1963), ____ U. S. ____, 54 LRRM 2612, 2615; and *Liner vs. Jafco* (1964), ____ U. S. ____, 84 S. Ct. 391, 396.

²¹ In *United Construction Workers vs. Laburnum Construction Corp.*, 347 U. S. 656 at 665, this Court said: "to the extent * * * Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal liabilities for tortious conduct have been eliminated."

"* * * during the course of the strike against Respondent, Local 20 (Teamsters Union) 'contacted the management of Launder (Respondent's customer) * * * and asked that (Respondent's) trucks not be permitted to work * * * during the strike' (R. 273). As a result of this request Launder 'ceased doing business with' Respondent 'until the strike had been terminated' (R. 273). Compensatory damages in the amount of \$8,700.00 were awarded (R. 289) on the theory that this conduct 'violated the Ohio common law regarding unlawful secondary activity' (R. 275-6)." (Teamsters Union's brief, pp. 12-13.)

Further, on undisputed facts, the courts below held that, in violation of the state common law, the Teamsters Union requested the management of O'Connel (Respondent's customer) to refuse to use Respondent's trucks for hauling O'Connel's requirements of sand for the duration of the strike (F. 272, F. F. 7(c)).²² As a result, O'Connel ceased doing business with Respondent for the duration of the strike (R. 273). Damages in the amount of \$1,600.00 were awarded by the District Court and this award was affirmed by the Court of Appeals. (R. 289, 295.)

Further, on undisputed facts, the courts below held that, in violation of the state common law, the Teamsters Union requested the management of Schoen (Respondent's customer) to cease doing business with Respondent for hauling its requirements of sand during the strike (R. 274, F. F. 96).²²

Thus, the undisputed facts establish, and the lower courts held (R. 275-6, 295), that the Teamsters Union en-

²² The lower courts also found, on undisputed facts, that the Teamsters Union also encouraged O'Connel's employees and employees of France (Respondent's supplier) to engage in a concerted refusal to use or load Respondent's trucks for the purpose of requiring O'Connel to cease doing business with the Respondent, in violation of Section 303, LMRA (R. 272, 275) and the state common law (R. 275-6).

gaged in secondary activity, unlawful under the state common law, in applying pressure directly on Respondent's customers to encourage them to stop doing business with the Respondent during the strike.

On pages 18-19 of its brief, the Teamsters Union suggests that an award of compensatory and punitive damages based on a complaint alleging only that the union engaged in a common law secondary boycott would be reversed on the ground that the NLRB had exclusive jurisdiction, citing *Electrical Workers Local 426 vs. Baumgartners Elec. Construction Co.*, 359 U. S. 498, reversing per curiam 77 S. D. 273, 91 N. W. (2) 663. The *Baumgartners* case does not by any means support the broad proposition for which it is cited by the Teamsters Union and that case is clearly distinguishable from this case. The activity complained of in *Baumgartners*. (See 91 N. W. (2) 663 at 669) was union activity violative of Section 8(b)(2), LMRA. Because the activity complained of was prohibited by LMRA and did not involve an imminent threat to the public order, the NLRB was held to have exclusive jurisdiction, 359 U. S. 498. But as will be shown below, the common law secondary activity here complained of was not even arguably prohibited or arguably protected by LMRA and the NLRB, therefore, had no jurisdiction with respect to it. In *Garmon*, 359 U. S. 236, 238, like *Baumgartners*, the activity complained of was found to have been prohibited by Section 8(b)(2), LMRA.²³

²³ On pages 17 and 18 of its brief the Teamsters Union, in footnotes 5 through 14, cites authority for its argument that "The range of the Labor Board's exclusive; primary jurisdiction is broad indeed." The following table, however, will demonstrate that the NLRB was held to have exclusive jurisdiction in those cases simply because the activity involved in each case was either protected or prohibited, or arguably so, by LMRA.

(Continued on following page)

The Compelling Precedent:

The Teamsters Union's Secondary Activity Violative of State Common Law Was Not Prohibited by LMRA.

The Teamsters Union has, of course, consistently maintained that the LMRA as enacted in 1947 does not prohibit the Teamsters Union's secondary activity complained of by the Respondent as violative of the state common law. See the Teamsters Union's brief, p. 14. In

²³ (Cont'd):

These cases in no way affect the power of a court to apply state law to activity neither arguably protected nor arguably prohibited by LMRA.

Case	Reason for Holding NLRB had Exclusive Jurisdiction.
<i>UMW vs. Arkansas Oak Flooring Co.</i> , 351 U. S. 62.	Arguable violation of Section 8(a)(5). (See page 69.)
<i>Amalgamated Ass'n vs. Missouri</i> , 10 L. Ed. 2d 763.	Activity protected by Section 7, LMRA. (See page 768.)
<i>Weber vs. Anheuser-Busch, Inc.</i> , 348 U. S. 468.	Arguable violation of Section 8(b)(4). (See pp. 477-9.)
<i>Amalgamated Ass'n vs. Wisconsin E. R. Board</i> , 340 U. S. 383.	Activity controlled by Section 8(a)(5) and (b)(3). (See p. 399.)
<i>UAW vs. O'Brien</i> , 339 U. S. 454.	Activity protected by Section 7. (See p. 457.)
<i>Youngdahl vs. Rainfair, Inc.</i> , 355 U. S. 131.	Activity protected by Section 7. (See pp. 137-8.)
<i>Hotel Employees Union vs. Sar Enterprises, Inc.</i> , 358 U. S. 270.	Activity protected by Section 7. (See p. 271.)
<i>Machinists Lodge 34 vs. L. P. Cavett Co.</i> , 355 U. S. 39.	Violation of Section 8(b)(2). (See 103 Ohio Appeals 45.)
<i>San Diego Bldg. Trades Council vs. Garmon</i> , 359 U. S. 236.	Arguable violation of Section 8(b)(2). (See p. 238.)
<i>Amalgamated Meat Cutters Local 427 vs. Fairlawn Meats, Inc.</i> , 353 U. S. 20.	Violation of Section 8(b)(2). (See p. 23.)
<i>Retail Clerks Union vs. J. J. Newberry Co.</i> , 352 U. S. 987.	Arguable Section 8(b)(2) violation.

(Continued on following page)

Local 1976, Carpenters vs. NLRB, 357 U. S. 93, 98-9, this Court said:

"Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in Section 8(b)(4)(A). * * * Likewise, a union is free (so far as the LMRA is concerned) to approach an employer to persuade him to engage in a boycott, so long as it

²³ (Cont'd):

Garner vs. Teamsters Union, 346 U. S. 485. Arguable violation of Section 8(b)(2). (See pp. 488-9.)

Local No. 438 vs. Curry, 371 U. S. 542. Violation of Section 8(b). (See pp. 546-7.)

Farnsworth and Chambers Co. v. Local 429, IBEW, 353 U. S. 969. Arguable violation of Section 8(b), LMRA. (See 299 S. W. (2) 8, 9.)

Teamsters Local 24 vs. Oliver, 358 U. S. 283. Activity subject to Section 7 and 8(d). (See pp. 294-5.)

Teamsters Local 327 vs. Kerrigan Iron Works, Inc., 353 U. S. 968. Activity arguably subject to Section 7 or 8. (See 296 S. W. (2) 379, 382.)

General Drivers Local 89 vs. American Tobacco Co., 348 U. S. 978. Activity arguably subject to Section 7 or 8, LMRA. (See 264 S. W. (2) 250.)

McGray vs. Aladin Radio Indus., Inc., 355 U. S. 8. Activity arguably subject to Section 7 or 8, LMRA. (See 298 S. W. (2) 770, 777.)

Ex parte George, 371 U. S. 72. Activity arguably protected by Section 7. (See p. 73.)

Marine Engineers Ben. Asso. vs. Interlake S. S. Co., 370 U. S. 173. Arguable violation of Section 8(b). (See pp. 177-8.)

Liner vs. Jafco, 11 L. Ed. 2d 347. Conduct arguably subject to LMRA. (See 84 S. Ct. at 394-5.)

Electrical Workers Local 426 vs. Baumgartners Electrical Constr. Co., 359 U. S. 498. Violation of Section 8(b)(2). (See 91 N. W. (2) 663 at 669.)

Plumbers Union Local 298 vs. Door County, 359 U. S. 354. Violation of Section 8(b)(4). (See p. 356.)

Building Trades Council vs. Kinard Constr. Co., 346 U. S. 933. Activity subject to Section 7. (See 64 So. (2) 400, 403-4.)

refrains from the specifically prohibited means of coercion through inducement of employees." (Parenthetical phrase added.)

It only needs to be observed at this point that if the secondary activity here under discussion were prohibited by Section 303, LMRA, Respondent would be entitled to recover *thereunder* all of the compensatory damages granted Respondent herein.

The Compelling Precedent:

The Teamsters Union's Secondary Activity Violative of State Common Law Was Not *Protected* by LMRA.

This Court has held that the type of secondary activity here complained of as violative of the state common law "is not covered by the statute," *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99. Since the activity was "not covered" by the LMRA, it was not *arguably protected* thereby.

The Respondent recognizes that in *Garmon* (359 U. S. 236, 242) this Court said that preemption is "* * * concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration." But this statement in the *Garmon* opinion preceded the statement of what the Respondent submits is the overriding principle established by the *Garmon* decision: if the Board has clearly determined or if compelling precedent applied to essentially undisputed facts establishes that the activities in question are not arguably protected nor arguably prohibited by the LMRA, such activities are subject to state jurisdiction. This Court stated the principle thus (359 U. S. 236, 246):

"In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether

such activities are subject to state jurisdiction." (Emphasis added.)

This principle has been consistently applied by this Court since its *Garmon* decision.²⁴

What this Court said of the "intermittent and unannounced work stoppages" in *Local 232 UAW vs. Wisconsin Employment Relations Board, et al. (Briggs-Stratton)*, 336 U. S. 245,²⁵ applies equally to a union's direct appeals

²⁴ In re: *Green* (1962), 369 U. S. 689, 692-3; *Marine Engineers, etc. vs. Interlake Steamship Co.* (1962), 370 U. S. 173, 177-8; *Ex parte George* (1962), 371 U. S. 72, 73; *Local 438, etc. vs. Curry* (1963), 371 U. S. 542; *Ingres Steamship Co. vs. International Maritime W. U.* (1963), 372 U. S. 24, 26-27; *Local 100 vs. Borden* (1963), 373 U. S. 690, 693-4; *Local 207, Iron Workers, etc. vs. Perko* (1963), 373 U. S. 701, 707; *Retail Clerks vs. Schermerhorn* (1963), ____ U. S. ____, 54 LRRM 2612, 2615; and *Liner vs. Jafco* (1964), ____ U. S. ____, 84 S. Ct. 391, 396.

²⁵ This decision "has remained fully intact, and, * * * underlay the decisions in *Laburnum* and *Russell*." Concurring opinion, *San Diego Bldg. Trades vs. Garmon*, 359 U. S. 236, 253. Although, as noted in *NLRB vs. Insurance Agents' Int. Union*, 361 U. S. 477, 493, footnote 23, "the approach to preemption taken in *Briggs-Stratton* * * * (i.e.) that the state courts and this Court on review (are) required to decide whether the activities were either protected by Sec. 7 or prohibited by Sec. 8 * * * is 'no longer of general application,'" it is submitted that the *Briggs-Stratton* case is still otherwise applicable to this case. Further, we recognize that the dissenting opinion in the *Briggs-Stratton* case (336 U. S. 266, footnote 1), stated that "It was held in *NLRB vs. Peter Cailler Kohler Swiss Chocolates Co.*, 2 Cir., 130 F. (2) 503, 505, 506, that the right to engage in a sympathetic strike or a secondary boycott was a concerted activity protected by Sec. 7 prior to the 1947 amendments." The *Peter Cailler* case however did not involve an appeal by a striking union direct to the struck employer's customers and therefore did not hold that such activity is or was protected. That case held that a resolution adopted by the union representing the employees of a chocolate company, protecting the company's action in regard to a milk strike by a cooperative dairy farmers' association was a "concerted activity for mutual aid or protection of employees" within the protection of the N.L.R.A., so as to make the discharge of the union's president for instigating the passage and publication of the resolution an "unfair labor practice." On the other hand, for example, when presented with a case in which an employer had discharged employees who, in sympathetic

(Continued on following page)

to the management of a struck employer's customer, since this Court said in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99, that the latter activity is likewise "not covered" by the LMRA:

"Congress has not seen fit in either (the National Labor Relations Act, 49 Stat. 449, or the LMRA) to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control * * * However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude states from exerting their police power must be clearly manifested'." 336 U. S. 252-3.

Neither the "intermittent and unannounced work stoppages" involved in *Local 232 UAW vs. W.E.R.B.*, 336 U. S. 245, nor the union's direct appeal to the Respondent's customer Launder in this case is protected by Section 7²⁶ or Section 13²⁷ of the LMRA and what this Court said in the former case is equally applicable here:

²⁵ (Cont'd):

support of fellow union members on strike at a different plant refused to handle orders from the struck plant, the Eighth Circuit declined to rule that the "mutual aid or protection" language of Sec. 7 of the NLRA was meant to encompass such conduct. *NLRB vs. Montgomery Ward*, 157 F. (2) 486, 496.

²⁶ Section 7, LMRA (29 USC Sec. 157) provides in part: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing; and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The direct appeal by the Teamsters Union's business agent to the management of Respondent's customer Launder was not protected by Section 7 for the further reason that such appeal was not concerted activity by Respondent's employees.

²⁷ See following page.

"In the light of labor movement history, the purpose of (Section 7) becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. *But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert.* 336 U. S. 245, 257-8 (Emphasis added.)²⁵

* * *

"That Congress has concurred in the view that neither Section 7 nor Section 13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike. The House Committee of Conference handling the bill which became the Labor Management Relations Act, on June 3, 1947 advised the House to recede

²⁷ Section 13, LMRA (29 USC, Sec. 163): "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

²⁸ As stated in *NLRB vs. Electronics Equipment Co.* (CA-2) 194 F. (2) 650, 652, the NLRB has held that "union activity is not protected under section 7 LMRA merely because it does not constitute an unfair labor practice, to which the Board is authorized to attach penalties. *The American News Co.*, 55 NLRB 1302; *Thompson Products Co.*, 70 NLRB 13, as amended in 72 NLRB-886." Likewise, in this case, it cannot be argued that a striking union's appeals direct to the struck employer's customer is protected merely because it is not prohibited by LMRA.

from its disagreement with the Senate and to accept the present text upon grounds there stated under the rubric 'Rights of Employees.' H. R. Rep. 510, 80th Cong., 1st Sess., p. 38. The Committee pointed out that 'the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. * * *.' 336 U. S. 245, 260.

* * *

"And Section 13 plus the definition only provides that 'Nothing in this Act * * * shall be construed so as to interfere with or impede' the right to engage in these activities. What other Acts or other state laws might do is not attempted to be regulated by this section. Since reading the definition into Section 13 confers neither federal power to control the activities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the right of the state to resort to its own reserved power over coercive conduct as it has done in this instance." 336 U. S. 245, 263-4.

A striking union's appeals direct to the struck employer's customer has long been and is violative of the Ohio common law.²⁹ As noted in the foregoing quotation, this Court has held that Section 7, LMRA did not make illegal action legal and Section 13, LMRA does not attempt to regulate what state law might do. This supports this Court's statement in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99 to the effect that a striking union's appeals

²⁹ 33 *Ohio Jurisprudence* (2) Section 64, Secondary Boycott, pages 187-8; *Moore & Co. vs. Bricklayers' Union, et al.*, 10 Ohio Decision Reprint 665 (affirmed by the Supreme Court of Ohio, 51 O. S. 605); *Schmidt Packing Co. vs. Local Union No. 346, Amalgamated Meat Cutters & Butcher Workmen of North America, et al.*, 48 ALC 547 (1947); and *W. E. Anderson Sons Co. vs. Local 311 Teamsters, etc.*, 156 O. S. 541.

direct to an employer are not covered by the LMRA. Because this Court has held that Section 7, LMRA did not make illegal action legal and because the activity here complained of has long been illegal under the state common law, such activity cannot be said to be "arguably protected" by Section 7, LMRA.

Further, the Respondent Submits that Congress, in its enactment of the LMRA in 1947, *intended*, in Section 8(b) and Section 303, LMRA to outlaw and make compensable under the Act, the type of secondary activity described above and found by the courts below to have been violative of the state common law. In *Local 1976 Carpenters v. NLRB*, 357 U. S. 93, this Court held that Congress failed to do so. Surely, the secondary activity here complained of (i.e., the union appeals direct to Respondent's customers, without the latter's employees being contacted or encouraged) cannot be held to have been *protected* by LMRA when Congress intended, albeit unsuccessfully, to *prohibit* such activity.

Senator Taft's explanation of the secondary boycott provisions of the 1947 Act, as quoted in *NLRB vs. Denver Building Trades* (1951), 341 U. S. 675, 686, discusses secondary boycott activity in very broad terms and establishes, we submit, that he understood that all secondary activity would be outlawed and made compensable, for the first time under federal law, by LMRA Sections 8(b) and 303:

"Senator Taft, who was the sponsor of the bill in the Senate and was the Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, said, in discussing this section: '* * * under the provisions of the Norris-LaGuardia Act (29 U. S. C. A. Section 101 et seq.), it became impossible to stop a secondary boycott or any other kind of a strike,

no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair practice.' 93 Cong. Rec. 4198."

This Court has held that the 1959 amendments to the LMRA are "relevant consideration(s)" in determining the meaning of the LMRA as adopted in 1947. *NLRB vs. Drivers, etc., Local Union #639*, 362 U. S. 274, 291. Accordingly, we look to the legislative history of the 1959 amendments and find that the Senate Minority Report to original S. 1555 contains the following discussion with respect to the language that was finally made a part of S. 1555, thereby amending Section 8(b)(4), and Section 303, LMRA, so as to proscribe pressure applied directly against secondary employers, without their employees being involved:

"VI. Secondary Boycotts.

"* * *

"The basic justification for banning secondary boycotts is to protect genuinely neutral employers and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer. Congress thought it had achieved this objective when, in adopting the Taft-Hartley Act in 1947, it enacted section 8(b)(4) of the National Labor Relations Act. Unfortunately, decisions of the National Labor Relations Board and the courts have no interpreted section 8(b)(4) as to leave a number of gaping loopholes through which genuinely neutral

employers and their employees continue to be victimized by the use of the secondary boycott. (Emphasis added.)

"The major loopholes in the present ban on secondary boycotts are:

"(1) *Coercion of employers.*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purpose of compelling their employer to cease doing business with some other person. This provides the biggest loophole in the present law. The prohibition is against the threatening or urging of the 'employees' of the other employer. Nothing is said about urging or persuading the employer of the secondary employees. * * *

"The bill, S. 478, meets this problem by amending section 8(b) (4) of the present law to make the restriction apply to 'threaten, coerce, or restrain any person engaged in commerce * * *' as well as 'induce or encourage any individual employed by any person.'" U. S. Code Cong. and Adm. News (1959), 2382-3.

Since the enactment of LMRA in 1947 was intended to outlaw the type of secondary activity here complained of, that Act cannot be said to protect such activity.

The Respondent is not, of course, arguing at this late date that this Court was wrong in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, and that Congress was successful in 1947 in intending to outlaw inducement and coercion of the management of a primary employer's customers and suppliers in the enactment of original Sections 8(b) and 303, LMRA. The Respondent does contend that this Court was correct, in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93, 99, in holding that such activity was *neither* arguably prohibited *nor* arguably protected by LMRA.

The whole sense of the legislative history of the enactment of the LMRA in 1947 is that Congress was opposed to secondary strike activity *generally* and may have intended to proscribe it, *generally*. It is not possible to even *argue* that Congress intended to, or did, *protect* direct inducement and coercion of the management of a primary employer's customers; and this Court has foreclosed the argument that such activity was *prohibited*, in *Local 1976 Carpenters vs. NLRB*, 357 U. S. 93.

Since "upon compelling precedent applied to essentially undisputed facts" (*Garmon*, 359 U. S. 236, 246), the Teamsters Union's secondary activity complained of by Respondent as violative of the state common law, was neither arguably protected nor arguably prohibited by LMRA, the District Court was free to award compensatory and punitive damages based upon the state common law.

CONCLUSION.

When the Teamsters Union's lawful primary strike proved ineffective to cripple Respondent's business, the Teamsters Union brought pressure to bear upon the Respondent's customers and suppliers. The Court of Appeals held (R. 295) that "The findings of fact of the district judge as to secondary boycott activities violative of Section 303, LMRA and of the state common law are amply supported by the evidence and are not clearly erroneous. *Commissioner of Internal Revenue vs. Duberstein*, 363 U. S. 278, 291." The Court of Appeals also held (R. 296) that "The basis upon which the lower court awarded compensatory damages in the amount of \$19,619.62 was a reasonable and justifiable one" and "As to the punitive damage award of \$15,000.00, we cannot say that there was an abuse of discretion. The fact that the

activities here did not involve violence does not entitle defendants to absolution from punitive damages. Had there been violence it may well be that punitive damages in a much greater amount would be justifiable."

The Teamsters Union cannot argue that it did not damage the Respondent in an amount at least equal to the award of damages herein or that its activities for which compensatory damages were awarded were not done maliciously and with wanton disregard of Respondent's rights.

The Teamsters Union violated Section 303, LMRA and Respondent is entitled to recover damages thereunder. These damages include the profit lost by the Respondent as a consequence of not having enough truck drivers report for work during the strike, since the lack of drivers was caused by a combination of the Teamsters Union's various activities, part of which were lawful, part of which were violative of Section 303, LMRA and part of which were violative of the Ohio common law.

The complaint herein sets forth but one cause of action and the identical acts of the Teamsters Union which violated Section 303, LMRA also violated the Ohio common law. Accordingly, the courts below had jurisdiction to award damages under such common law.

This Court's opinion in *San Diego Building Trades Council vs. Garmon*, 359 U. S. 236, does not require a different result. And, in any event, the courts below were correct in awarding all of the damages awarded because, even under *Garmon*, state common law can be applied since this case involved imminent threats to the public order and since the activity for which damages have been awarded under the state common law was neither arguably protected nor arguably prohibited by the Labor Management Relations Act of 1947.

For the foregoing reasons, the judgment below should
be affirmed.

Respectfully submitted,

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APPENDIX A.

Section 303 of the Labor Management Relations Act of 1947 provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to

conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."